YEARBOOK OF INTERNATIONAL & EUROPEAN CRIMINAL AND PROCEDURAL LAW
Vol.1, n.1, 2022 Article 1

The role of International Criminal Court Prosecutor according to art. 16 StICC

Maurizio Cacioppo

DOI:10.5281/zenodo.10575780

THE ROLE OF INTERNATIONAL CRIMINAL COURT PROSECUTOR ACCORDING TO ART. 16 STICC

DOI:10.5281/zenodo.10575780

Maurizio Cacioppo, Post Ph.D at the University of Basel.
Attorney at Law

Abstract: The present research is focused on the deferral power of International Criminal Court (ICC) Prosecutor in order to suspend the judicial activity. The StICC tries to offer some coordination tools, whose correct and careful use should in principle favor a harmonious and effective interaction between the two organs ICC and Security Council (SC)) avoiding thus the emergence of conflicts. Despite these intent of the statutory provisions, the margin of discretion inevitably granted to ICC and SC in interpreting the extension of the powers recognized to them, can lead to tensions and contrasts of not easy solution. The final considerations aim to examine the relevance of the possible coordination models of the action of the two bodies, proposed during this introduction, in defining the forms that the interactions between ICC and SC take. Some reflections aimed at highlighting the effects resulting from the dynamics of the relationship between the two organizations on the legitimacy and effectiveness of the ICC action close the investigation.

Key words: Deferral, art. 16 StICC, SC, international criminal law, prosecutor, ICC, UN Charter.

Security Council power to suspend ICC's judicial activity: Art. 16 StICC

The Statute of the International Criminal Court (StICC) recognizes SC's power to temporarily suspend International Criminal Court (ICC) jurisdictional activity (Liakopoulos, 2020). Its *raison d'etre* is found in the need to prevent the criminal repression of international crimes from hindering the achievement of stable and lasting peace. The very existence of the power of deferral can therefore be considered a tangible manifestation of the difficulty of reconciling peace and justice. More precisely, the suspension power attributed to Security Council (SC) expresses the fact that these fundamental values and purposes of international law can in some cases conflict with each other and cannot be pursued jointly.

In the course of armed conflict or post-conflict transitions, the immediate and undoubted purpose of SC is to come to an end the hostilities or to re-establish a situation of normal and peaceful coexistence. In such contexts, the criminal repression of those responsible for the crimes and the satisfaction of the victims and their family members can be considered secondary or better extendable, with respect to the need to restore peace

and security, stop the ongoing violence or avoid its repetition (Werle, Jessberger, 2020). It can therefore be more generally stated that the possibility that SC intervenes to attest ICC judicial action also represents an explicit recognition of the non-absolute character of the value of international criminal justice (Abbas, 2005). StICC admits in high words the need that in some cases the administration of criminal justice at an international level can give way to political initiatives aimed at protecting the legal good of maintaining international peace and security. To this aim, art. 16 in practice grants a sort of prevalence, albeit temporary, over the assessment of individual responsibility for the Commission of international crimes under ICC jurisdiction.

As has already been mentioned in part when referring to referral power, the need to provide for a power to suspend ICC by General Assembly (GA) or other UN bodies had been felt both in the early debates[1]. Although the existence of this suspension power has been proposed even before the activation one, the possibility that SC arrest the judicial activity of ICC has nevertheless raised more legal policy problems than the power to activate its action. And this for the obvious reason that there

1In particular, one can find in those first meetings a proposal aimed at attributing to GA or to other UN organs, the exercise of a particular power, potentially necessary for the purpose of the maintenance of peace "to stop the presentation or prosecution of a particular case before the Court". See, Committee on international criminal jurisdiction, summary record of the eighteenth meeting, UN doc. A/AC.65/SR.18, p. 15.

is a contrast here between the activity of the two bodies and not as in the case of the referral, a coincidence of purposes and interests.

The results achieved at the of Rome Conference on the nature and scope of this particular power show various critical issues and, for many, the achievement of compromise solutions dictated by the need to find a difficult balance between peacekeeping and justice needs. There are two elements that most characterized the debates that took place during the works that led to the drafting of this provision. The first concerns the very way in which the judicial activity of ICC would have been interrupted or otherwise limited by SC action. In particular, it was a question of deciding whether the use of the criminal instrument should be automatically precluded by the mere circumstance that SC was already dealing with the situation subject to potential investigations or instead foreseeing and on the basis of which assumptions, the need for an explicit and formal request for suspension by the political body. The second crucial aspect concerns the temporal element or the possibility of setting a limit to the duration of the suspension and the possibility of renewing and extending it by SC.

As regards the first point, it should be remembered that despite the persistent problems and the inevitable criticisms that the exercise of the power of deferral still provokes the arrest of the

criminal action, it was originally conceived in a much more incisive form than it currently holds[2]. Still in the draft Statute of 1994 drawn up by International Law Commission (ILC) (Liakopoulos, 2020), in fact, the ICC could in no case have intervened on issues with which SC was dealing in the exercise of the powers attributed to it by Chapter VII of the UN Charter. In other words, the blocking of ICC judicial activity did not require a prior and explicit political decision, the impossibility of ICC action being rather conceived as a direct and automatic consequence of the need not to interfere with the ongoing action of SC. Art. 23 (3) of the project of the Statute provided that ICC could not deal with any case "being dealt with the SC" unless the latter had decided otherwise[3].

In this first hypothesis-considered the inevitable consequence of the primacy recognized in SC by art. 12 of UN Charter of the primary responsibility attributed to it under art. 24 regarding peacekeeping[4], it would therefore have been sufficient for any matter to be dealt with SC to prevent ICC judicial activity. And this potentially for an indefinite time. The SC, through the

2See revised report of the working group on a draft Statute for international criminal court, A/CN.4/l.490 and Add. 1, in Yearbook of the International Law Commission, 1993, vol. 2, pp. 109ss.

3Report of the international law Commission on the work of its forty-sixth session, UN doc. A/49/10, 2 May-22 July 1994, art. 23, par. 3.

4Draft Statute for an international criminal court with commentaries, in Yearbook of the International Law Commission, 1994, vol. II, part two, art. 23, pp. 45ss. See also art. 12, par. 1 of the Charter.

introduction of prolonged sanctioning regimes[5], could have prevented ICC judicial activity for at least in theory the unlimited period. In fact, sometimes rather long times are known, in which a situation of conflict, even if only potential, can remain on the agenda of SC and how complicated it can be to establish the moment when a given situation is no longer on the agenda[6].

As noted by some representatives of States, the UN Charter and in particular the aforementioned art. 12 does not grant a similar priority to SC action compared to ICC judicial activity, but only to GA. In light of the relevant ICC jurisprudence without this being considered as an obstacle to the tasks assigned to SC[7]. A similar speech could therefore have been made for ICC.

5The sanctions adopted in the 1990s against Iraq are certainly included in this category. Moreover in the period of the cold war in which SC was not able to adopt decisions because of the known practice of the crossed vetoes, different situations were found constantly in the agenda of SC, without however that they could be assumed concrete misuse of intervention.

6Report of the ad hoc Committee on the establishment of an international criminal court, Official records-Fiftieth session, supplement n. 22, UN doc. A/50/22, 1995, par. 120. Some state representatives argued that this approach merely reflected the nature and scope of the SC's prerogatives in maintaining international peace and security. However, this initial hypothesis was also the subject of numerous reservations, once again concentrated on the excessive limits and obstacles that the ICC's judicial activity would have encountered. See for example the position of New Zealand in sixth Commission, UN General Assembly, 1st November 1995, p. 2, which is affirmed that: "(...) It would be shameful if the large and powerful, with permanent privileges on SC, were able to prevent the criminal Court from dealing with a situation by simply claiming that they were already of the matter (...)".

7Report of the ad hoc Committee on the establishment of an international criminal court, General Assembly official records-Fiftieth session, supplement n. 22, UN doc. A/50/22, 1995, parr. 124-125. See in particular, ICJ, Case of diplomatic and consular personal of the American Embassy in Tehran v. United States v. Iran, sentence of 24 May 1980, in ICJ Reports 1980, pp. 21 and Nicaragua v. United States, sentence of 26 November 1948, in ICJ Reports 1984, pp. 434ss.

In order to remedy the critical remarks made against the solution just outlined during the works of the second half of the nineties, two different proposals were therefore made. The first-although aimed at limiting the effects of art. 23 (3) through the important clarification that the SC had to be actively engaged in resolving the situation of threat to peace, the basic idea of the project took up substance (Schverch, 2017; Babaian, 2018)[8]. The second decidedly more innovative proposal proposed by Singapore was destined to obtain some success and become the starting point of the debate within the Rome Conference[9].

While retaining SC power to stop ICC's activity, the well-known Singapore compromise has completely overturned the prospect emerged from the project. It is no longer possible for SC to obstruct the jurisdictional activity of ICC simply by dealing with a specific situation. It is necessary to adopt a resolution expressly aimed at suspending the ICC action, otherwise always possible. The new proposal imposes in practice the assent (or at least the abstention) of the permanent members to prevent the Prosecutor or the ICC judges from continuing to exercise their investigative powers or continue the ongoing proceedings (Liakopoulos, 2019). The possible exercise of veto power in this case plays a positive role, i.e. that the investigations or

8Preparatory Commission Draft Statute, article 10 (7), option 2, par. 2.

9The proposal of Singapore back in session of August of 1996 of preparatory committee, A/AC.249/WP.51, See non paper WG.3/N.16, 8 August 1997.

proceedings could continue. Singapore's proposal provided that:

"no investigation or prosecution may be commenced or proceeded with under this Statute where the SC has acting under Chapter VII of the UN Charter given a direction to that effect (…)" (Marc De La Sablière, 2018).

On the basis of this text, the final compromise solution contained in art. 16 of the Rome Statute. Not without two important changes that must also be recalled for the importance that they will assume during the course of this investigation. With the first, due to a proposal from Costa Rica, the generic and imprecise term direction was created to describe the initiative undertaken by SC, with the provision of a real formal request and specific decision. The second proposal from Canada, on the other hand, was aimed at setting a time limit of 12 renewable months for the suspension request (Hall, 1997; Kaulk, 1997; Mokhtar, 2003; Von Glahn, 2015)[10].

In relation to this second element, the other aspect emerges, i.e the object of a broad comparison between the States mentioned above. Quite a few delegations had insisted that the possibility of resorting to the deferral be somewhat limited. It was in particular but not only the Latin American states that asked that this tool could be used by SC only once, without the possibility

10The reversal of perspective described and the two proposed changes have won the support of most States. Opponents were not lacking. The United States still did not appreciate a provision that did not adequately guarantee SC's power of control over ICC. Among the permanent members of SC worried in different ways and of losing a power of dominion over the activity of ICC, the soil carried out by the United Kingdom was decisive, which first and at least initially, in an isolated manner, supported the Canadian variant to the compromise proposed by Singapore.

of renewal[11]. Italy itself supported the idea that the power of deferral should not only be confined to a specific period of time but also characterized by a limited possibility of renew (Schabas, 2016; Elaby, 2017).

These positions were evidently driven by the fear that the SC through the repetition of suspension requests could in fact paralyze ICC's activity for an indefinite time. According to some of the criticisms often addressed to the provision in question, the absence of a limit to the renewal and therefore the fact that the SC not only suspend but also definitively lend ICC action produces a dangerous dependence of the judicial body on the political one. If these concerns appear to be well founded in principle, the need to formulate a further request for suspension requires SC to reconsider the situation in which it believes that ICC criminal action is an obstacle to peace. The adoption of a new resolution on the basis of Chapter VII of the UN Charter will be necessary with the possibility from time to time that the exercise of the veto power by one of the permanent members allows ICC to start or resume its work (Bourgon, 2002)[12].

Despite the important adjustments introduced during the

11UN diplomatic Conference of plenipotentiaries on the establishment of an international criminal court, official records, vol. II, 15 June-17 July 1998, Summary record of the plenary meetings and of the meetings of the committee of the whole, A/CONF.183/C.1/SR.1, pp. 207.

12An exercise of deferral power renewed periodically in order to permanently block the action of ICC as much as possible would be “difficult to judge and support in the eyes of the international community (...)”.

negotiations, art. 16 represents the most controversial and problematic tool of the relationship between the eminently political role of SC and the necessary independence of ICC. Many of these criticalities emerge in particular from how the power of deferral was understood and put into practice by SC, rather than from its formulation which, although not without elements of uncertainty and ambiguity[13], appears to be the result of a complex, but all in all balanced between opposing needs.

Finally, it is interesting to remember that the arrangement has been the subject of some modification proposals in the last drafts[14]. These requests show a certain dissatisfaction at least by

13Just think to give an example to the silence of the Statute on the effects of the suspension of a proceeding with respect to the collection of evidence against the suspects or the preservation of those already collected. On this point we will return, but we can recall an interesting proposal from the Belgian government aimed at allowing the Prosecutor to preserve the evidence gathered during the suspension period. See, United Nations diplomatic conference of plenipotentiaries on the establishment of an international criminal court, Official records, vol. II, 15 June-17 July 1998, summary records of the plenary meetings and of the meetings off the committee of the whole, A/CONF.183/C.1/SR.1, pp. 97ss.

14Towards the end of 2009, South Africa proposed to the Assembly of states to discuss an amendment to art. 16 with the aim of introducing two new paragraphs. On the one hand it was intended to foresee that the state competent to exercise jurisdiction over the situation subject to ICC's attention could formally ask the SC to cancel the power of suspension. On the other hand, in the event that the SC had not taken a decision on the matter within 6 months of the request from the state concerned, it could have submitted the same question to the GA (Proposal for amendment by South Africa to the statute, C. N851.2009. TREATIES-10, 30 November 2009). A year later, in view of the review conference of the statue of Kampala, the African Union promoted a similar request: the case of inaction of the SC following a request for suspension, the GA could exercise its own autonomous power of deferral African Union executive Council, 16th ordinary session, report on the ministerial meeting on the Rome statute, 25-29 January 2010 (EC.CL/568 (XVI) Annex 1). The document states that this power would be used: "in conformity with UN General Assembly Resolution 377 (V)1950 known as Uniting for peace resolution. It emerges from these proposals all the dissatisfaction of the African states on the use of the SC of this very delicate instrument and the attempt to at least

some States, towards the prerogative recognized to SC through art. 16 or at least of the practice relating to its exercise (Sander, 2021).

Relationship between activation and suspension in ICC jurisdictional activity

The analysis conducted in relation to the exercise of the referral power has highlighted the crucial relevance of the meaning to be attributed to the term "situation" in order to determine whether SC can limit the investigation of the Prosecutor's activity. Depending on how that notion is interpreted, in particular as regards the possible limitation or extension of ICC jurisdiction, a series of suspensive effects on the judicial action could be envisaged, not so dissimilar from those potentially produced by the exercise of power deferral required by art. 16 StICC. More

partially transfer some possibility of intervention to the GA. The proposal was not taken into consideration at the revision conference of the statute of Kampala in 2010. In 2013, the possibility to amend to the art. 16, however, is once again the subject of discussion. The Assembly of the states has commissioned the working group on amendments to continue to deal with the amendment proposals and in particular those: "submitting following the decision by the extraordinary summit of the African Union held on 12 October 2013" (See, Mandates of the Assembly of states parties fro the intersessional period, ICC-ASP/12/Res.8, Annex I, 27 November 2013, par. 12 (A)). This last decision provides for the establishment of an executive committee, composed of five members of the different regions of the African continent charged with discussing with the SC of the UN a series of questions relating to the relationships between the SC itself and the ICC. Among the issues expressly object of this comparison stand out the proposals to stop the international penal action in the cases of Kenya and Sudan and more generally the modalities of exercise of such power by the SC (Extraordinary session of the Assembly of the African Union, 12 October 2012, Addis Abeba, Ext/Assembly (AU/Dec.1-2 (Oct. 2013)-Ect/Assembly/AU/decl.1-4 (Oct.,2013), decisions and declaration, op. 4).

precisely, if it is believed that SC can somehow circumscribe Prosecutor's action, the referral tool may also end up performing suspensive functions with respect to ICC action, typical of the tool governed by art. 16 StICC. The admissibility of an activation of the investigations that provides for the exemption from the jurisdiction of some categories of individuals, would in practice have the effect of at least partially precluding the repressive action of ICC for various reasons already explained in the previous chapter. The exemptions provided by SC Resolutions do not seem compatible with the fundamental characteristics of the exercise of referral power.

However, all this does not seem to exclude that the two powers of activation and suspension of the judicial action can be exercised simultaneously by SC. Some authors have indeed denied this hypothesis by drawing a parallel between the referral power provided by art. 13 b) StICC and the establishment of ad hoc courts. The statutes of these international criminal jurisdictions in effect:

> "do not recognize any power of the Council to prevent or stop the tribunals from investigating or prosecuting specific individuals" (Bergsmo, Pejic, 2008; Bergsmo, Pejic, Zhu, 2016, Ambos, 2022).

Once the jurisdiction of an international tribunal was activated, it would therefore no longer be possible for SC to stop its action. As much as one can criticize, the particular formulation of art. 16, that is the power of deferral is not by chance the subject of

the most heated debates during the preparatory work that has no precedent in the history of relations between SC and the international criminal courts established by it (Zimmermannn, 1998) and therefore cannot find a useful term in those experiences for comparison. Not only does such a pre-eminence of political power over judicial power find no correspondence or analogy in the relations that SC has with any other international jurisdiction including International Court of Justice (ICJ) (Bergsmo, Pejic, 2008)[15].

In a different perspective art. 16 should however be interpreted in symmetry with the language used in article 13. In practice and for the same reasons already amply highlighted in the previous Chapter, SC would have the power to suspend situations (as required by art.13 b)) but it could not instead intervene in specific cases. If this were not the case, the power to select the targets of the Court's investigations and prosecutions would be recognized in practice[16]. As seen the literal data and the ratio of the provision, however, do not seem to limit the power of SC to suspend a particular proceeding or a particular investigation activity with respect to only some of the crimes committed or

15According to Bergsmo, Pejic, "(…) is also unprecedent in terms of the legal relationship it establishes between SC and a judicial body. Neither ICJ in its work nor national courts dealing with crimes arising from situations on SC's agenda under Chapter VII, are under an express obligation to defer proceedings upon a request by the Council (…)".

16Shortly after the author acknowledges the possible suspension of the proceedings against Al Bashir but only how "part of a wider decision to defer the situation of Darfur".

against certain individuals within the wider situation referred to ICC. It can therefore be imagined, for example, that SC asks the ICC bodies to suspend within a wider situation which it remits to them only a specific proceeding in progress against a head of State. In the same way, SC could prevent the launching of gaps in investigations relating to particular criminal conduct set in motion in the wider context of a referral armed conflict. Ultimately the particular power contained in art. 16 StICC does not seem to exclude that SC limits ICC jurisdictional activity, even in the case in which the activation of the judicial bodies originated from a request to that effect by SC.

The delicacy and pervasive potential inherent in the exercise of this power is completely evident. It allows SC to compress ICC's criminal prosecution and limit it even only in relation to some specific situations such as the case of the procedure undertaken against a head of State. It is for the good to keep in mind the political costs of the explicit recognition made by SC in relation to the fact that ICC judicial activity in the repression of international crimes represents an obstacle to the maintenance of international peace and security (Bergsmo, Pejic, 2008). Beyond the political implications resulting from the suspension requests, which may in any case limit the use of this instrument, it is then necessary to take into due consideration the conditions set by the Statute for the exercise of this particular power by SC. It is

precisely these limits analyzed in the previous pages that mitigate the repercussions of the deferral on the independence and autonomy of ICC and try to somehow reconcile the demands of peace with those of justice.

Some problems regarding the preservation of justice interests in the event criminal action's suspension

Finally, it is necessary to mention some problematic issues which, although not yet emerged in practice, may arise in cases of suspension of the ICC's activities following a request by SC. We refer in particular to the consequences of the deferral on the preservation of the evidence collected on the danger of the defendants' escape on the protection of witnesses and on the very possibility of being able to hear them (Ruiz Verduzco, 2015; El Amine, 2012). More concretely, to give just a few examples, it is not clear whether, following the deferral, a defendant must be released in full freedom with the risk that it will no longer be possible to capture him when the procedure is reactivated. In the same way it is necessary to understand what should be done of those tests that expose themselves to a possible deterioration and that if not collected in a timely manner can become unusable for the purposes of the process.

No statutory provision deals with disciplining in case of suspension of the proceeding by SC, Prosecutor's powers and

ICC to guarantee the integrity of the suspended proceeding and the effectiveness of its continuation. A regulation of these aspects would certainly have been desirable.

Indeed problems similar to those just mentioned emerge when a State raises a question of inadmissibility with respect to a specific case. In these hypotheses, the Prosecutor is forced to suspend its investigations for a certain period and wait for an ICC decision. The latter, however, may authorize the Prosecutor himself to hear the witnesses, to adopt a series of conservative measures relating to the evidence already collected or to order precautionary measures against individuals for whom an arrest warrant has already been requested (art. 19 (8)) (Ambos, 2022). Moreover, at least as regards the protection of witnesses and the collection of evidence, a legal basis for Prosecutor's powers can be found in the same Statute of Rome. In fact, among the prerogatives of that office listed in art. 54 StICC, the last letter f) also provides for the possibility of adopting the necessary measures "to ensure the confidentiality of information, the protection of any person or the preservation of evidence (...)" (Darques-Lane, Madec, Godart, 2012; Foka Taffo, 2018)[17]. Moreover, according to some reconstructions even in the

17The ICC has extended the applicability of this provision also to the trial phase despite the placement of the provision within the statute that would make it applicable only to the investigation phase. See in this case: Prosecutor v. Lubanga, reasons for oral decision lifting the stay of proceedings, trial Chamber, ICC-01/04-01-06. 23 January 2009, par. 39.

absence of art. 54 f) just referred to

> "all three powers listed must have been considered inherent insofar as they are essential to the functioning of an independent office of the Prosecutor" (Bergsmo, Kruger, Bekou, 2016).

The legitimate adoption by ICC bodies of provisional measures useful to guarantee the future initiation of a proceeding or the continuation of the suspended measures could then be justified in the light of the theory of implicit powers and the need, therefore, that ICC also exercises those powers not expressly provided for by the Statute that allow it to perform its functions (Albert, Merlin, 2018). It may perhaps be considered that the measures indicated in the provision are not exhausted but the Prosecutor may in any case adopt similar measures, if it deems them essential for a correct administration of justice and for a greater protection of the independence and autonomy of ICC. These assessments must be made by ICC bodies in light of the Statute and the needs related to the exercise of the judicial function regardless of any requests in this area by SC, whose only prerogative is to preclude the start or continuation of an investigation or an ongoing proceeding.

Concluding remarks and outlook

The Prosecutor in his role of discretion has made no decision on the basis of prosecutorial discretion to select the current situations. The African situations have been selected on the

basis of the satisfaction of the legal requirements, but not prosecutorial discretion. *In speciem,* the situations that were rejected were dismissed on the basis of the non-satisfaction of the legal requirements. Accordingly, the focus of the examination of the charges of politicisation, derived from the exercise of selective justice, in fact, informs as technically the Prosecutor has not made any situational decision so far on the basis of prosecutorial discretion. For this reason, this study sought a different approach to analyse why the Prosecutor receives the charges of politisation, derived from the exercise of discretion. The problem may lie with the hidden sense of discretion that has been effectively and widely exercised by the Prosecutor when interpreting the legal requirements for initiating investigations or prosecuting cases. In particular, on the term “sufficient gravity” that constitutes the key legal admissible criterion for initiating investigations or prosecuting cases. “Sufficient gravity” is a legal admissible criterion and is supposed to be applied through a clear and consistent manner. The ICC also endorsed a low level for the assessment of "sufficient gravity", as the Appeals Chamber and the Pre-Trial Chamber decided in the Lubanga and Ntaganda cases and the Comoros situations respectively. The Prosecutor has used two different methods to interpret “sufficient gravity”: a) the comparative method, and b) the judgment method (threshold).

The Prosecutor took account of a wide range of factorial analysis to determine the issue of "sufficient gravity". The Prosecutor was picking from scale, impact, manner of commission, and nature of crimes. For example, in using the comparative approach, the Prosecutor heavily depended on the quantitative measure, namely the number of victims. In using the threshold judgment, the Prosecutor sometimes used one factor to reject a situation, the insistent use of the quantity measure to evaluate gravity does not only undermine the legitimacy of the ICC, but also the global character of the ICC. It also restricted the reach of the ICC to only big situations and cases instead the gravest ones. Thereafter, the Office of the Prosecutor adopt a relative meaning of the term scale instead of using an absolute one. The relative meaning of scale provides that the Office of the Prosecutor should conclude the percentage of “the scale of the crime” according to the total number of the given society itself, compared to the total population of the country, and not to the other cases that might involve thousands of incidents and crimes.

As we can understand from the above analysis: 1.In terms of referrals, the prosecutor has no discretion-whether prosecutorial discretion or legal interpretive discretion-to initiate admissible referred situations, according to the Comoros’s judgement, which the Prosecutor can exercise prosecutorial discretion only

at the stage of the assessment of “the interests of justice”. In particular, gravity in its relative sense under the art. 53 StICC “interests of justice” provisions can be considered by the prosecutor when exercising prosecutorial discretion. Before the PTC’s decision in the Comoros situation, it was established and emphasised that the prosecutor in effect exercised a broad discretion, which we could called legal interpretive discretion; 2.In relation to the prosecutor’s *proprio motu* power, the extent of prosecutorial discretion the prosecutor can exercise is not clear. Art. 15 (1) StICC clearly authorises the prosecutor to exercise prosecutorial discretion (Liakopoulos, 2020). However, paragraph (3) of the same article contains an obligatory language enforcing the prosecutor to proceed with the investigation. The ICC has not made any clear judgment on this question, and the matter is still debated; 3.With respect to the selection of admissible cases, the StICC are silent. However, there is an explicit and common consensus among commentators and authors that the prosecutor has an implicit power to reject any case on the basis of “the interests of justice”, in particular “relative gravity”, whatever the trigger mechanism is. The Office of the Prosecutor has just published a new policy document on the selection of cases and confirmed that it has broad prosecutorial discretion when selecting among legally worthy admissible cases. The paper particularly sets three

criteria for this selection, namely: the gravity of the crimes, the degree of the responsibility of the alleged perpetrators (Liakopoulos, 2018), and the potential charges; 4.The prosecutor sits at the critical juncture of the efficiency and sufficiency of the ICC at furthering its institutional goals. Whilst the prosecutor is required to maintain the sufficiency of the ICC as a legal body, which works independently without concrete prescriptions, she is required as well to make the work of the ICC efficient and capable of achieving its institutional aims. Whilst the first stands for the value of independence, the latter refers to the value of discretion. The strict commitment to the legal rules does not necessarily render the work of the ICC efficient. The ICC is not yet an ideal resort to address all sorts of atrocities, and that its ability to deliver justice is considerably limited. There are often legitimate political questions that are necessary for making the work of the ICC efficient at furthering its institutional goals (Liakopoulos, 2018).

These set of considerations are vital to the success of the ICC in furthering its institutional aims, including justice, peace and security, and it recommends the Office of the Prosecutor to follow them, given the current circumstances in which the ICC works. The decision to initiate investigations or proceed with prosecutions are not only contingent on the legal criteria of the Statute. There are always extra-legal factors and political

circumstances necessary for the exercise of meaningful prosecutorial missions. The engagement of the prosecutor in the particularities of situations and cases is very important for enforcing meaningful justice that the ICC itself may not be able to do. The consideration of extra-legal factors is essential for the viability, efficacy, efficiency, and independence of the ICC. The consideration of these political circumstances within the decision making-process is because these kinds of political considerations are intrinsic to international justice.

The policy of denial rhetoric has mainly prevented the Prosecutor from delivering justice on several occasions. Applying the law in its rigid formula has not helped the Prosecutor to do meaningful justice in Sudan or Uganda. Several pragmatic considerations in these situations required the prosecutor to use her discretion to stop the ICC's proceedings as an option and allow for other alternatives to replace the ICC's approach. The existence of these two poles established that the ICC is not yet an ideal approach to deal with all atrocities. Most situations under the ICC jurisdiction are still experiencing mass violation of human rights. Some conflicts are still in progress. The peace-related problems in Sudan, Uganda, and Kenya are, to a large extent, impeded by the policy of the Prosecutor.

Based on above recommendations, it was also found that contemporary international prosecutors have more roles to

deliver. The development of the international criminal law, rectius justice and the jurisprudence of international prosecutors all contributed to developing the role of an international prosecutor, as a new international player within the international legal arena and international politics. For instance, when the prosecutor stops the criminal proceedings, using her discretionary power, based on "the interests of justice", the prosecutor, in fact, may be addressing other values, such as stability or peace-related considerations. This process confesses the prosecutor's new roles to play alongside with her main mandate in delivering justice. Accordingly, the current international Prosecutor can/should exercise a multifunction of roles in order to promote those values. With the establishment of the ICC, we have begun to see a dramatic development in the idea of the prosecution in terms of both the legal and practical level. It is a multi-functional prosecution. The creation of the ICC witnessed a formal emergence of a new sense of prosecution, where the role of the prosecutor has been formally widened, accordingly. Article 53 StICC was a product of the historical development of the exercise of the discretionary power by the previous prosecutors. Although this form of power was not clear enough either theoretically or practically in the work of the Military Tribunals, it was clear enough in the practice of the Special Criminal Tribunals (Liakopoulos, 2020).

With the arrival of the ICC, we have begun to see that these developments have been embedded in the law.

However, in considering the political considerations, the prosecutor must aim at achieving justice. The consideration of peace processes (a political influence) on the basis of "the interests of justice" can be accounted for only when such processes are associated with some sort of justice mechanisms. This is often the case when international justice of the ICC is not attainable due to some obstacles, then other justice mechanisms might be more meaningful and needed. The use of the apologist considerations as a tool to achieve the utopian end, which is justice, in its broad sense, is the approach that may legitimately help justify the consideration of political factors. As the prosecutor is expected to be independent, respecting the rule of law when exercising her discretion, she is also expected to be flexible, as discretion is in nature a power that stands outside the law. The prosecutor may need to give weight to considerations that are not warranted in law. The ignorance of one of these premises posed the prosecutor in the dyadic criticisms.

The long strife between the advocate of bringing criminal justice to perpetrators at any cost and those who call for the abandonment of criminal justice in favor of peace may just end with neither justice nor peace delivered to both victims and perpetrators. The tension between these two values is still yet to

be sorted out. The impotent enforcement mechanisms that the ICC holds make the ability of the ICC as a main international protector of victims highly questionable, in particular that the ICC has achieved little since its operation in 2002. That means, that the ICC should abandon its proceedings whenever its ability to deliver its own justice is not possible. In fact, based on the practice of the Prosecutors of the ad hoc Tribunals, the ICC prosecutor is required to analytically and carefully examine potential effects and ability of the Court, before intervening in a certain situation. Although this is not an easy task, as the ICC prosecutor cannot predict every single circumstance of the future, however, there are still different strategies that the prosecutor can follow in case it appears that the Court's approach is not workable. The strategy of delaying an investigatory or prosecutorial decision is one of the most effective, as we have seen with regard to the practice of the ICTY. We made a distinction between the strategy of the ICTY Prosecutor and the ICC Prosecutor in relation to the decision of indicting Milosević and Al-Bashir, respectively, where the first was successfully brought to the Tribunal, whilst Al-Bashir remains at large. The results of the exercise of this strategy of prosecution were the blatant failure of the Office of the Prosecutor to bring any alleged perpetrator to the Court, including the President, the refusal of many of African states,

including those who are parties to the ICC, to cooperate with the Court to arrest Al-Bashir or to promote the fragile peace negotiations, and to put an end to humanitarian tragedy in Darfur. On the other hand, the Prosecutor of the ICTY did not initially make a decision against Milosević, although he was responsible for many atrocities. The Prosecutor instead took several pragmatic considerations such as the fact that Milosević was needed for the peace process at the time, and more importantly his power and role. Through the exercise of prosecutorial discretion, allowing enough time to build a strong case against a high ranking leader, by indicting lower indictees such as Karadzić and Mladić, and the others facilitated and paved the way for the Prosecutor to make the biggest decision. The ICC Prosecutor did not follow such a strategy and did not give any attention to the peculiarities of the situation of Darfur and the potential impacts that may result from indicting the most high-ranking official in Sudan-President Al-Bashir-in a rushed way. This simply ended with a zero achievement in Sudan. The ICC Statute and Rules of Procedure and Evidence emphasised the importance of the participation of victims in proceedings. Explicitly, article 53 StICC requires the prosecutor to consider the voices of victims before proceeding with her investigation or prosecution (Liakopoulos, 2020). This particular factor is highly crucial to changing the type of the decision the prosecutor may

make. If the local voices of a certain conflict favor a certain form of alternative other than the ICC, then the prosecutor is highly likely required to respect this particular demand. The Uganda situation has shown a typical example, where the majority of voices favored the peace demands ahead of justice. Even more to the point, the majority of Ugandans sought the local justice mechanism to replace the ICC. In such a scenario, the Prosecutor should have stepped back and allowed for the local alternatives to take place. Any potential failure of the prosecutor, therefore, to respond to every side of the argument does not mean that the prosecutor is in a crisis. The persistent criticism is a healthy phenomenon and does not nullify the good mission that the Court, and, in particular, the prosecutor has conducted so far. On the contrary, the dyadic criticisms helped us to find why the prosecutor faces criticisms, and also pushed us to look for solutions for some dyadic arguments. It is true that some dyadicisms cannot be resolved due to the strong legal arguments that each side uses, however, there has often been means to reduce others (Liakopoulos, 2018).

References

Abbas, A. (2005). The competence of the Security Council to terminate the jurisdiction of the international criminal court. *Texas International Law Journal, 4,* 272ss.

Albert, J., Merlin, J.B. (2018). *L'avenir de la justice pènale internationale.* ed. Larcier, Bruxelles.

Ambos, K. (2022). *Rome statute of the International Criminal Court.* Hart/Beck/Nomos, Cheltenham, Baden-Baden.

Babaian, S. (2018). *The International Criminal Court. An international criminal world court? Jurisdiction and cooperation mechanisms of the Rome statute and its practical implementation.* ed. Springer, Berlin, 2018, 23ss.

Bergsmo, M., Kruger, P., Bekou, O. (2016). Article 54. In O. Triffterer, K. Ambos, *The Rome statute of the international criminal court. A commentary.* B.C. Beck, Hart, Nomos, München, Oxford, Baden-Baden, 1392ss.

Bergsmo, M., Pejic, J. (2008). Article 16. In O. Triffterer, *Commentary on the Rome statute, observer's notes, article by article.* Oxford, Baden-Baden, München, 604ss.

Bourgon, S. (2002). Ratione temporis. In A. Cassese, P. Gaeta, J.R.W.D. Jones, *The Rome statute of the international criminal court. A commentary.* Oxford University Press, Oxford, 564ss.

Darques-Lane, F., Madec, C., Godart, S. (2012). Article 54. In J. Fernandez, X. Pacreau, *Statut de Rome de la cour pènale*

internationale-Commentaire article par article. ed. Pedone, Paris, 1256ss.

El Amine, H. (2012). Article 16. In J. Fernandez, X. Pacreau, *Statut de Rome de la cour pènale internationale-Commentaire article par article.* ed. Pedone, Paris, 676ss.

Elaby, K. (2017). *The role of the Security Council and the independence of the International Criminal Court. A challenge of impunity.* Taylor & Francis, New York, 45ss.

Foka Taffo, F. (2018). *Le pouvoir discretionnaire du procureur de la cour pènale internationale.* Nomos Verlag, Baden-Baden.

Hall, C.K. (1997). The first two sessions of the UN preparatory committee on the establishment of an international criminal court. *American Journal of International Law, 91 (1),* 1822ss.

Kaulk, H.P. (1997). Towards a permanent international criminal court. *Human Rights Law Journal, 7,* 172ss.

Liakopoulos, D. (2018). International standards and responsibility competition according to the International Criminal Court: Anatomy, interpretation, proposals. *Revista Eletrônica de direito Penal e Polìtica Criminal-UFRGS, 6.*

Liakopoulos, D. (2019). *The function of accusation in International Criminal Court. Structure of crimes and the role of Prosecutor according to the international criminal jurisprudence.* ed. Maklu, Antwerp, Portland.

Liakopoulos, D. (2020). *Autonomy and cooperation within the*

International Criminal Court and United Nations Security Council. W.B. Sheridan Law Books, ed. Academica Press, Washington, London.

Liakopoulos, D. (2020). *Complicity of States in the international illicit.* ed. Maklu, Antwerp, Portland.

Marc De La Sablière, J. (2018). Le Conseil de sècuritè des Nations Unies. ed. Larcier, Bruxelles.

Mokhtar, A. (2003). The fine art of arm-twisting. The US resolution 1422 and security council deferral power under the Rome statute. *International Criminal Law Review, 3 (4),* 305ss.

Ruiz Verduzco, D. (2015). The relationship between the ICC and the United Nations Security Council. In C. Stahn, *The law and practice of the International Criminal Court.* Oxford University Press, Oxford, 60ss.

Sander, B. (2021). *Doing justice to history: Confronting the past in international criminal courts.* Oxford University Press, Oxford.

Schabas, W.A. (2016). *The international criminal court. A commentary on the Rome statute.* Oxford University Press, Oxford, 422ss.

Schverch, R. (2017). *The International Criminal Court at the mercy of powerful states. An assessment of the neo-colonialism claim made by African stakeholders.* ed. Springer, Berlin, 224ss.

Von Glahn, G., Taulbee, J.L. (2015). *Law among nations: An introduction to public international law.* ed. Routledge, London & New York.

Werle, G., Jessberger, F. (2005). *Principles of international criminal law.* Oxford University Press, Oxford, 2020.

Zimmermann, A. (1998). The creation of a permanent international criminal court. *Max Planck Yearbook of United Nations Law, 2,* 236ss.